BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT NOVOTNY	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,020,372
QUEST ENERGY SERVICES, INC.	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the August 25, 2006 Award of Administrative Law Judge Thomas Klein. This matter was placed on the Board's summary calendar and deemed submitted on November 17, 2006.[1]

APPEARANCES

Claimant appeared by his attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Michael D. Streit of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ).

ISSUE

What is the nature and extent of claimant's injuries?

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[1] K.S.A. 2004 Supp. 44-551(b)(1) and K.A.R. 51-18-4(b).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

The Award sets out findings of fact and conclusions of law and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

Claimant suffered accidental injury arising out of and in the course of his employment on July 19, 2004, when, while driving a company truck, he was involved in a motor vehicle accident. As a result of the accident, claimant was rendered unconscious. He was airlifted to Wesley Medical Center in Wichita, Kansas. Claimant sustained multiple bruises, contusions, lacerations and a distal clavicle fracture on the left side. He received stitches and staples in his head, face, left arm and right knee.

Claimant was referred to his family doctor, Bert Chronister, M.D., for ongoing treatment of the lacerations and for dressing changes on his left arm.[2] Claimant was then referred to board certified orthopedic surgeon William L. Dillon, M.D., for an examination and followup treatment of the fractured left clavicle, with the first examination on July 22, 2004. Claimant underwent an open reduction and internal fixation of the fractured left distal clavicle on July 23, 2004.

Claimant returned to Dr. Chronister on July 26, 2004, for dressing changes of the clavicle, suture removal above the left eye, staple removal at the left scalp, suture removal at the left elbow, and wound cleaning and dressing replacement. Claimant returned to Dr. Chronister on July 30, 2004, for removal of one staple remaining in the right scalp and suture removal from the right knee.

Claimant returned to Dr. Dillon on August 5, 2004, for a followup exam. At that time, claimant's incision was healing and there was no indication of inflammation or swelling. He returned to Dr. Dillon on August 19, 2004, for a followup exam. The incision was again healing satisfactorily, with no indication of swelling or inflammation. X-rays taken of the left shoulder revealed a healing distal clavicle in satisfactory position.

Claimant returned to Dr. Chronister on August 20 with a complaint of a piece of glass in his left forearm. This glass was removed and the wound dressed.

Claimant returned to Dr. Dillon on September 16, 2004, for a followup examination. At that time, claimant had no pain and displayed a full range of motion of the left shoulder. X-rays again revealed the clavicle was in satisfactory position and alignment.

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[2] Claimant was first seen by Dr. Chronister on July 21, 2004.

Claimant then returned to Dr. Chronister on October 5, 2004, at which time claimant reported that he noted knots on his left forearm. X-rays revealed two subsurface foreign bodies which were not causing claimant any difficulties. The doctor determined that since the foreign bodies were not causing claimant any discomfort, they could remain until they became tender, at which time they could be excised. This was claimant's last visit with Dr. Chronister as a result of this accident.

Claimant returned to Dr. Dillon on October 14, 2004, for a final visit. Claimant's incision was well healed and there was no inflamation or tenderness. Claimant reported no pain. Claimant was released to return as needed. Dr. Dillon, in his letter of November 12, 2004, determined that, pursuant to the fourth edition of the AMA *Guides*,[3] claimant had no permanent impairment as a result of this accident.[4] At no time during the multiple visits with Drs. Dillon and Chronister did claimant complain of injuries to his bilateral knees. The only mention of claimant's knees occurred when Dr. Chronister removed the sutures from claimant's knee on July 30, 2004.

Dr. Chronister again examined claimant in July 2005, when claimant returned after a fall at work in June 2005 and a 4-wheeler accident on June 25, 2005. Claimant was last examined by Dr. Chronister for these complaints on July 26, 2005, at which time claimant was released to return as needed. Claimant was examined by Dr. Chronister in September 2005 for a DOT physical, which claimant passed with no difficulties. Claimant had no leg complaints at that time.

Claimant was examined by board certified orthopedic surgeon Edward J. Prostic, M.D., at the request of claimant's attorney on January 17, 2005. At that time, claimant was diagnosed with post-surgical repair of the left clavicle, which Dr. Prostic noted was progressing toward healing. Claimant was also diagnosed with bilateral knee pain with patellofemoral dysfunction. In a followup letter of February 16, 2005, Dr. Prostic rated claimant at 12 percent of the left upper extremity for the residuals of the surgery, 12 percent for the left leg atrophy and patellofemoral dysfunction, and 8 percent of the right leg for the patellofemoral dysfunction, for a combined rating of 15 percent to the whole body, pursuant to fourth edition of the AMA *Guides*.[5]

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[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[4] Dr. Dillon admitted on cross-examination that he failed to review the AMA *Guides* before determining his rating of claimant.

[5] AMA *Guides* (4th ed.).

In workers compensation litigation, it is the claimant's burden to prove his/her entitlement to benefits by a preponderance of the credible evidence.[6]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[7]

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.[8]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[9]

The Award in this matter was limited to claimant's left upper extremity. The ALJ denied claimant any award for the alleged injuries to claimant's bilateral lower extremities, finding that the court was not persuaded that claimant suffered a permanent impairment to his lower extremities as a result of the accident. The Board agrees. Claimant was examined and treated on multiple occasions by both Dr. Dillon and Dr. Chronister. Except for the July 30, 2004 visit, when Dr. Chronister removed sutures from claimant's right knee, claimant failed to mention his knees. This was despite claimant's testimony at regular hearing that he experienced constant knee pain since the accident. Claimant testified that his knees hurt while at the doctor's office. Yet, he never mentioned the pain during any of the examinations. The ALJ noted, and the Board agrees, that claimant's ability to pass the DOT physical in September 2005 with no knee complaints also casts doubt on the reliability of the complaints expressed by claimant.

The ALJ awarded claimant a 12 percent impairment for the injuries suffered to his left upper extremity. The Board, after considering the evidence, agrees and affirms that award.

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[6] K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

[7] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[8] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[9] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Thomas Klein dated August 25, 2006, should be, and is hereby, affirmed.

The record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.[10]

IT IS SO ORDERED.

Dated this ____ day of January, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Michael D. Streit, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[10] K.S.A. 44-536(b).